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**in the Supreme Court of the United States**

**OCTOBER TERM, 1958**

**UNITED STATES OF AMERICA, APPELLANT**

**RADIO CORPORATION OF AMERICA AND NATIONAL  
BROADCASTING COMPANY, INC.**

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA**

**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES**

**J. LEE HARTIN,**

**Attorney General,**

**Department of Justice,**

**Washington, D. C.**



# **in the Supreme Court of the United States**

**OCTOBER TERM, 1957**

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**No. 943**

**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**RADIO CORPORATION OF AMERICA AND NATIONAL  
BROADCASTING COMPANY, INC.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF PENNSYLVANIA**

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## **SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES**

The Solicitor General respectfully submits to the Court this memorandum of the Federal Communications Commission, setting forth its views on certain aspects of this case which concern the Commission.

**J. LEE RANKIN,**  
*Solicitor General.*

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### **STATEMENT**

The holding of the district court (Juris. St. App., p. 16-21) that the United States is barred from maintaining a civil suit to enforce the Sherman Act (26 Stat. 209, as amended, 15 U. S. C. 1, *et seq.*) by prior action of the Federal Communications Commission approving an exchange of broadcasting

licenses pursuant to the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U. S. C., sec. 151 *et seq.*), raises problems of concern to the Commission. This memorandum sets forth the Commission's views as to the nature of its licensing action and the practical difficulties confronting the Commission as a result of the decision of the district court.

The licensing proceeding before the Commission began on June 15, 1955, when National Broadcasting Company (NBC) and Westinghouse Broadcasting Company (Westinghouse) filed applications, pursuant to Section 310 (b) of the Communications Act, seeking Commission consent to an exchange of their respective radio and television stations in Cleveland, Ohio, and Philadelphia, Pennsylvania. The Commission ordered a staff investigation of the proposed exchange to ascertain (1) whether it would involve any substantial overlap of service areas between stations owned by the same party in contravention of Section 3.636 of the Commission's Rules and Regulations (47 C. F. R. Sec. 3.636) and (2) the circumstances which led to the agreement between NBC and Westinghouse. The Commission also informed the Antitrust Division of the Department of Justice of the proposed exchange and subsequently advised the Antitrust Division as to the results of its investigation. On December 21, 1955, the Commission, upon the basis of investigatory reports from its staff and replies of NBC and Westinghouse to letters of inquiry sent out by the Commission pursuant to Section 309 (b) of the Communications Act, approved the exchange. Public notice of this action was given on

December 28, 1955 (FCC Public Notice 27067, Rep. No. 2793).

The foregoing action of the Commission was taken without a hearing and without any majority opinion. One commissioner issued a dissenting opinion in which, *inter alia*, he stated his personal view that "certain provisions of the Clayton Act (*viz.*, 15 U. S. C. Sec. 18) might prevent the Federal Trade Commission and Justice Department from taking any *effective* action in the event they concluded that possible violations of the antitrust laws were involved in the circumstances of these transactions." Two commissioners among the majority issued a reply statement asserting that "it is difficult to see how approval of this exchange may effectively preclude other governmental agencies from examining into this or any other transaction of the network companies."

In a subsequent official public statement with respect to the NBC-Westinghouse exchange submitted on June 27, 1956, to the Antitrust Subcommittee of the House Judiciary Committee (Hearings before the Antitrust Subcommittee of the Judiciary Committee of the House of Representatives, 84th Cong., 2d Sess., Part 2, Vol. 1, p. 3181), the chairman of the Commission stated that "while the majority of the Commission decided that granting consent to the transfers would be in the public interest, it did so only on the understanding that it was not foreclosing the Department of Justice from taking appropriate action should it determine that such action was warranted." On December 12, 1956, shortly after the United States instituted the civil antitrust suit against NBC and



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Radio Corporation of America (RCA) which is the subject of this appeal, the Commission approved NBC's application to acquire control of another television station in New Britain, Connecticut, on the following condition: "provided, however, that this Order shall be without prejudice to whatever action the Commission may deem appropriate at such time as presently pending antitrust action involving the National Broadcasting Company (transferee) may be terminated." On July 18, 1957, the Commission renewed NBC's licenses for its Philadelphia radio and television stations on the similar condition that such "action is without prejudice to whatever action the Commission may deem appropriate at such time as presently pending anti-trust actions involving Radio Corporation of America and the National Broadcasting Company, Inc., may be terminated."

On June 18, 1957, the Commission filed with the district court, as *amicus curiae*, a Memorandum of Law directed toward the third, fourth, and fifth defenses raised by the defendants' answer in the instant antitrust proceeding. In this Memorandum of Law the Commission took the position that in approving the Westinghouse-NBC exchange, it did not in fact determine whether the transaction was violative of the antitrust laws and did not intend to foreclose antitrust proceedings by the United States. In addition, the Commission took the further position that, regardless of its intentions, it could not as a matter of law grant antitrust immunity by its actions in broadcast licensing cases.

## DISCUSSION

1. The holding of the district court that Commission approval of an exchange of broadcast licenses bars the United States from subsequently maintaining an antitrust suit involving the same transaction,<sup>1</sup> poses serious practical difficulties for the Commission. The Commission is faced with the equally undesirable alternatives of either deferring action on any broadcast matter with antitrust implications until after the United States has proceeded in the courts or itself becoming a forum for antitrust litigation. Postponing action while the Department of Justice conducts an investigation, evaluates its findings, determines whether or not to proceed, and, if so, processes the case through the district and appellate courts would not only deprive the public of needed broadcast service in many instances but also thwart the statutory directive that the Commission "conduct its proceedings in such manner as will best conduce to the proper dispatch of business" (Section 4 (j) of the Communications Act, 47 U. S. C. 154 (j)) and "promote prompt and efficient disposition of all matters within the jurisdiction of the Commission" (Section 5 (a) of the Communications Act, 47 U. S. C. 155 (a)). On the other hand, to compel antitrust violations to be litigated before the Commission would bog it down in extended trials and frustrate the Commission's performance of its assigned duties.

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<sup>1</sup> While the district court acted upon a stipulation of fact, as to which the Commission was neither a party nor consulted, its decision on the controlling law is not limited to the circumstances of the instant case.

Commission licensing proceedings instituted by application of private parties, where the determination of whether or not to hold an evidentiary hearing lies solely within the discretion of the Commission, are not an appropriate forum for the trial of antitrust proceedings by the United States. At the time of a license application the Government may not have in its possession, in a form appropriate for immediate introduction into evidence, full information as to the events which might constitute the antitrust violation. Even if it does, the evaluation of whether this evidence is sufficient to warrant proceedings under the antitrust laws would appear to be the prerogative of the Department of Justice, which has responsibility for enforcement of these laws, and not that of the forum which would be required to pass upon the matter. Moreover, the Commission may well lack full remedial powers or jurisdiction over the entire pattern of conduct on which an antitrust suit is based. Thus, the scope of the antitrust suit here exceeded the issues before the Commission. The issues in the antitrust case are not limited to the NBC-Westinghouse exchange but include also an allegation of a continuing unlawful conspiracy or combination by RCA and NBC; and the relief sought by the United States in the antitrust proceeding goes beyond mere vacation of the transfer approved by the Commission.

2. For the reasons set forth in the Jurisdictional Statement (pp. 8-13), we believe that the decision of the district court is erroneous. In brief, we agree that Section 313 of the Communications Act expressly makes the antitrust laws applicable to broadcasting



and authorizes a district court, in any suit brought to enforce such laws, to revoke the Commission-granted license of an antitrust violator. Nowhere in the Communications Act did Congress confer upon the Commission power to grant antitrust exemptions in broadcasting although it conferred such power with respect to telephone and telegraph common carriers. Sections 221 (a) and 222 (c) (1) of the Communications Act (47 U. S. C. 221 (a) and 222 (c) (1)).

In determining whether the grant of a broadcast license will serve the public interest under Sections 309 and 310 (b) of the Communications Act (47 U. S. C. 309 and 310 (b)), the Commission considers and evaluates the conduct of applicants insofar as it relates to matters entrusted to the Commission. *Report on Uniform Policy as to Violation by Applicants of Laws of the United States, Docket No. 9572 (1950)*, 1 Pike & Fischer Radio Regulation, Part III, 91:495. But the Commission does not, and did not here, purport to enforce the antitrust laws or to determine whether particular practices are violative of such laws; it analyzes the "substance of these practices \* \* \* to determine their relevance and weight as regards the ability of the applicant to use the requested radio authorization in the public interest," (*Id.*, 1 Pike & Fischer, R. R., Part III, 91:497). As the Commission has stated with the approval of this Court: "It is not our function to apply the antitrust laws as such" (*National Broadcasting Company v. United States*, 319 U. S. 190, 223-224). See also, *Mansfield Journal Company v. Federal Communications Commission*, 180 F. 2d 28, 33-34 (C. A. D. C.).

Concurrent with the jurisdiction of the Department of Justice to enforce the Sherman Act, the Commission, of course, has jurisdiction to designate license applications for hearing on public interest questions arising out of facts which might also constitute violations of the antitrust laws. This does not mean, however, that its action on these public interest questions of communications policy is a determination of the antitrust issues as such. Thus, while the Commission may deny applications as not in the public interest where violations of the Sherman Act have been determined to exist, its approval of transactions which might involve Sherman Act violations is not a determination that the Sherman Act has not been violated, and therefore cannot forestall the United States from subsequently bringing an antitrust suit challenging those transactions.

Respectfully submitted,

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**Federal Communications Commission.**

**MAY 1958.**